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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>VINCENT STONE,<br><br>Defendant and Appellant. | B282505<br><br>(Los Angeles County Super. Ct. No. BA449071) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne E. Egerton, Judge. Affirmed and remanded.

Myra Sun, under appointment by the Court of Appeal, for Defendant and Appellant Vincent Stone.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Acting Supervising Deputy Attorney General, Steven E. Mercer and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Vincent Stone was convicted following a jury trial of second degree robbery. On appeal he argues the trial court erred by admitting photographs taken from a social media account, refusing to strike the victim's testimony after he would not disclose the names of potential eyewitnesses and denying Stone's motion for a new trial based on prosecutorial misconduct. Stone also argues the evidence was insufficient to support the jury's finding the robbery was committed for the benefit of a criminal street gang. We remand to allow the trial court to consider whether to exercise its discretion under a new law, effective January 1, 2019, to strike or dismiss a prior serious felony conviction for sentencing purposes. In all other respects we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

On September 6, 2016 Stone was charged by information with one count of robbery (Pen. Code, § 211)[1] with special allegations a principal had personally used a firearm during the robbery within the meaning of section 12022.53, subdivisions (b) and (e)(1), and the robbery was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The information also specially alleged Stone had suffered three prior serious or violent felony convictions within the meaning of the three strikes law (§§ 667, subds. (b)-(j), 1170.12) and two serious felony convictions under section 667, subdivision (a).

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[1] Statutory references are to this code unless otherwise stated.

2. *Evidence at Trial*

Shortly before midnight on July 30, 2016 Jerry Evans and a friend arrived at another friend's apartment building near the intersection of Stocker Street and Santa Rosalia Drive in Los Angeles. Evans was meeting four other friends outside the apartment building so the group could go to a party together. After Evans got out of his car, two men, later identified by Evans as Stone and Clifford Gibson, drove by him. As they drove by, one of the men asked Evans if he wanted to "buy some lean." Evans did not know what "lean" meant, but he assumed it referred to a type of drug. Evans declined, and Stone and Gibson drove up the block and parked their car. They got out of the vehicle and stood near it. Stone was talking on a mobile phone, and Evans could hear him repeatedly saying "cuz" and "talking about 30's." Based on his experience growing up in that neighborhood, Evans understood "cuz" and "30's" to be references to gang affiliations.

Stone ended his telephone call, and he and Gibson approached Evans and his friends. Stone pointed a gun at Evans and said, "I should air your shit out," which Evans understood to mean, "I should shoot you." Gibson grabbed the gold chains Evans was wearing and pulled them off Evans's neck. Gibson took five chains from Evans, but one fell to the ground; and Evans recovered it later. Evans testified he was positive Stone was the individual who held the gun during the robbery.

After Stone and Gibson left, Evans went home. Evans testified he did not report the robbery to the police that night

because he had basketball practice the next morning.[2] He also stated he was reluctant to report the robbery because there was an "unspoken code" in the neighborhood that reporting crime is "something you just don't do."

The next morning, while Evans was browsing a social media website, he saw a video of Stone and Gibson wearing the jewelry they had taken from him. The video appeared on the website's "explorer" page, which Evans said he believed showed the user a collection of posts based on geographic location or mutual friends. He explained he viewed the explorer page often "just to see something new." Evans testified he did not have a known connection to the user who posted the video.

That evening Evans showed the video to his mother. She took a photograph of the video with her phone. Evans then went to the police station and reported the robbery. However, he did not tell the police about the video on social media until detectives visited his home on August 4, 2016. At that time Evans showed Detective Richard Campos the video on the Internet, and Campos took pictures of the video. Sometime later the investigating police officers conducted a search on social media for the video seen by Evans and the associated account. However, the account had been deleted, and the video could not be found. Three photographs taken by Evans's mother of the video were admitted at trial over Stone's objection.

Los Angeles Police Officer George Marquez testified regarding gang activity in the area where the robbery occurred. Marquez is a member of the southwest division's gang enforcement detail and is specifically assigned to monitor and

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[2] At the time of the robbery Evans was a professional basketball player in Europe.

investigate the activity of the Rollin 30's Harlem Crips criminal street gang. Marquez testified the Rollin 30's had started in the early 1970's in Harlem, New York, and had migrated to the Jefferson Park area of Los Angeles. At the time of trial the Rollin 30's had between 700 and 1,000 members. The gang had its own territory, hand signs, colors and symbols. The gang's primary activities included robbery, burglary, murder and narcotics. Marquez explained there were five subsets within the Rollin 30's. Members of the subsets "all hang out with each other. There's no feud between the sets."

Marquez testified he knew Stone from the neighborhood and had stopped him on the street approximately twice. In February 2016 Marquez had an encounter with Stone and three individuals Marquez knew to be Rollin 30's members. Stone admitted during this encounter that he was a member of the Rollin 30's. Stone also has tattoos consistent with Rollin 30's membership. Marquez also knew Gibson from numerous contacts in the neighborhood. On two occasions in 2015 Gibson identified himself as a Rollin 30's member to Marquez. On cross-examination Marquez opined Stone and Gibson were members of the 39th Street subset of the Rollin 30's based on where they were typically seen.

Officer Marquez stated the robbery in this case did not occur in Rollin 30's territory but in the territory of a rival gang. While it is rare for gangs to commit crimes in rival territory, Marquez explained the opposite was true for the Rollin 30's: "Rollin 30's rarely commit crimes in their territory because they get identified."

Given a hypothetical based on the facts of the case, Officer Marquez opined the robbery was for the benefit of, and in

association with, a criminal street gang: It showed the gang was able to intimidate the community and commit a crime in rival territory and any money derived from the stolen items would produce revenue to buy guns or narcotics. Robbery proceeds might also be used to buy luxury items to induce the youth in the community to join the gang.

Officer Marquez also testified regarding a 2014 conviction of a Rollin 30's member for possession of a firearm. Marquez was present at the arrest in that case and noted the defendant had tattoos indicating Rollin 30's membership.

Stone presented two witnesses in his defense. Stone's girlfriend, Holly Burnham, testified she was with Stone the night of the robbery starting around 10 p.m. Stone's father, Vincent Stone, Sr., testified he had seen Stone wear a gold chain prior to the robbery.

3. *The Verdict and Sentencing*

The jury found Stone guilty of second degree robbery and found the criminal street gang allegation to be true. The jury was unable to reach a unanimous finding on the firearm allegation, and it was dismissed on the prosecutor's motion.

Prior to sentencing Stone admitted each of the prior felony conviction allegations. The court struck two of the prior qualifying strike convictions in furtherance of justice and sentenced Stone as a second strike offender to an aggregate state prison term of 25 years: the upper term of five years for robbery, doubled under the three strikes law, plus 10 years for the

criminal street gang enhancement (§ 186.22, subd. (b)(1)(C)) and five years for a prior serious felony conviction (§ 667, subd. (a)).[3]

## DISCUSSION

### 1. *The Trial Court Did Not Abuse Its Discretion by Admitting the Social Media Photographs*

#### a. *Relevant proceedings*

On the first day of trial, before counsel gave their opening statements, Stone objected to the admission of the photographs of the social media video taken by Evans's mother. The photographs depicted Stone and Gibson wearing gold chains. The prosecutor informed the court Evans would testify he saw the video the day after the robbery and recognized the men he saw as the men who had robbed him. Evans would also testify he recognized the chains Stone and Gibson were wearing in the photographs as the chains that had been taken from him in the robbery. Stone's counsel objected to the admission of the photographs, arguing, "There's not going to be any verification or authentication as to what these photos mean in relationship to [the video]. . . . You could take a video with your cell phone. . . . You could sit around for a month and then post it later on; so the

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[3] While the court had discretion to dismiss two of the prior qualifying strike convictions for purposes of determining Stone's sentence under the three strikes law, the court did not, at the time of sentencing, have discretion to strike any of the prior serious felony conviction enhancements (see former § 1385, subd. (b)) and was obligated to add two five-year enhancements to the sentence imposed. On remand the court should consider both prior serious felony convictions when deciding whether to exercise its discretion to strike or dismiss the section 667, subdivision (a), enhancements.

posting date doesn't mean when the video itself was constructed." The prosecutor then conceded, "Because we don't have the video, we can't determine on what date it was posted." Stone's counsel also objected the photographs prejudiced Stone by showing him together with Gibson.

After hearing argument, the trial court indicated the photographs were admissible, stating, "He recognized the guys. It's no different from him driving down the road, and let's say he sees an ad for a T.V. show on the billboard, and the two actors are the guys who robbed him. He can say, 'Those are the guys.'" After further argument on potential prejudice the court stated, "They can put in photographs of the two of these gentleman together . . . . [T]he motion to preclude them from putting in pictures of Mr. Gibson is respectfully denied."

The next day the three photographs were marked for identification during Evans's testimony and the testimony of the prosecution's gang expert. Stone did not object to admission of the photographs on authentication grounds at that time. However, Stone's counsel made repeated objections to questions regarding identification of the accountholder(s) who posted or commented on the video and Evans's references to the video. One of those objections was on foundation grounds, but the prosecutor moved on before the court could rule. When the prosecutor requested permission to publish one of the photographs to the jury, the court told Stone's counsel, "You can have a standing objection." Later, during argument concerning whether the prosecutor could elicit evidence regarding the owner of the social media account, the court stated, "I don't know why you have to link this to Mr. Stone. The victim has testified that he is sure that these—that this is the man. I let you put in, over their

objection, the screenshots from the video because he said, 'I looked at these. I saw these guys. I recognized them.'"

b. *Stone did not forfeit his objection to the photographs*

The Attorney General argues Stone forfeited his objection to admission of the photographs because he did not object at the time the exhibits were marked for identification or moved into evidence. The Attorney General is correct that, to preserve an evidentiary objection for appeal, an objection must be "timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a); accord, *People v. Holt* (1997) 15 Cal.4th 619, 666-667.) "The reason for the rule is clear—failure to identify the specific ground of objection denies the opposing party the opportunity to offer evidence to cure the asserted defect. [Citation.] 'While no particular form of objection is required [citation], the objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.'" (*Holt*, at pp. 666-667.)

Generally, to preserve an objection, a party must raise the objection at the time the evidence is sought to be introduced. "A tentative pretrial evidentiary ruling, made without fully knowing what the trial evidence would show, will not preserve the issue for appeal if the appellant could have, but did not, renew the objection or offer of proof and press for a final ruling in the changed context of the trial evidence itself." (*People v. Holloway* (2004) 33 Cal.4th 96, 133.) However, "if a motion to exclude evidence is made raising a specific objection, directed to a particular, identifiable body of evidence, at the beginning of or during trial at a time when the trial judge can determine the

evidentiary question in its appropriate context, the issue is preserved for appeal without the need for a further objection at the time the evidence is sought to be introduced." (*People v. Crittenden* (1994) 9 Cal.4th 83, 127.)

Stone's objection at the beginning of the trial was sufficiently specific to preserve his objection for appeal. The objection was on a specific ground—foundation and authentication regarding the date the video was created or uploaded—and was directed to a specific body of evidence—the photographs of the video. The trial court's statements, both at the time of its ruling and during the trial, demonstrate it understood the context and basis for the objection.

c. *The photographs were adequately authenticated*

Authentication of a photograph is required before it may be admitted into evidence. (Evid. Code, §§ 250, 1401; *People v. Goldsmith* (2014) 59 Cal.4th 258, 266 (*Goldsmith*).) "A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location. [Citations.] Authentication also may be established 'by any other means provided by law' (§ 1400), including a statutory presumption." (*Goldsmith*, at pp. 267-268.)

"[T]he proof that is necessary to authenticate a photograph or video recording varies with the nature of the evidence that the photograph or video recording is being offered to prove and with the degree of possibility of error. [Citation.] The first step is to determine the purpose for which the evidence is being offered.

The purpose of the evidence will determine what must be shown for authentication, which may vary from case to case. [Citation.] The foundation requires that there be sufficient evidence for a trier of fact to find that the writing is what it purports to be, i.e., that it is genuine for the purpose offered. [Citation.] Essentially, what is necessary is a prima facie case. 'As long as the evidence would support a finding of authenticity, the writing is admissible. The fact conflicting inferences can be drawn regarding authenticity goes to the document's weight as evidence, not its admissibility.'" (*Goldsmith*, *supra*, 59 Cal.4th at p. 267.) We review the trial court's rulings on the admissibility of evidence for abuse of discretion. (*Id.* at p. 266; *People v. Lee* (2011) 51 Cal.4th 620, 643.)

Stone argues the prosecution offered the photographs for the purpose of "show[ing] the robbers wearing Evans' jewelry *after* the robbery." As such, Stone argues the prosecution was required to provide evidence demonstrating the video was created after the robbery, which it did not.

Stone's argument misconstrues the nature of the authentication requirement. The prosecution was required only to make "a prima facie showing . . . that the photograph is an accurate depiction of what it purports to depict." (*In re K.B.* (2015) 238 Cal.App.4th 989, 997; accord *People v. Valdez* (2011) 201 Cal.App.4th 1429, 1437 [prosecution not required "to establish validity or negate falsity in a categorical fashion, but rather to make a showing on which the trier of fact reasonably could conclude the proffered writing is authentic"].) Here, the photographs purported to be still images of the video Evans saw the day after the robbery, which depicted two men wearing gold chains. Stone does not argue the photographs do not depict him

wearing gold chains. Nor does he argue the photographs have been altered. Thus, he does not dispute the accuracy of the depictions in the photographs. Instead he challenges the validity of the inferences the People proposed be drawn from them: He contends the jury could not conclude the chains were those taken from Evans without evidence the video was recorded after the robbery. However, the prosecution was not required to authenticate the inferences it wished the jury to draw. The possibility of conflicting inferences as to when the video was recorded "'goes to the document's weight as evidence, not its admissibility.'" (*Goldsmith*, *supra*, 59 Cal.4th at p. 267; accord, *Valdez*, at p. 1435 [photograph from social media account was sufficiently authenticated by other content in the account; "Although [defendant] was free to argue otherwise to the jury, a reasonable trier of fact could conclude . . . that the [social media] page belonged to him. Accordingly, the trial court did not err in admitting the page for the jury to determine whether he authored it"].) All that was required was evidence enabling a trier of fact to find the photographs were what they purported to be. Evans's testimony sufficiently provided that evidence. (See *In re K.B.*, at pp. 997-998 [photographs taken by police of screenshots on cellular telephone of photographs posted on social media were sufficiently authenticated by police officer who took the photographs and testified they accurately represented what the officer had seen on social media].)

2. *The Trial Court Did Not Abuse Its Discretion by Denying Stone's Motion To Strike Evans's Testimony*

a. *Relevant proceedings*

Evans testified that in the six months since the robbery multiple police officers and deputy district attorneys had asked

him to reveal the names of the friends he was with when he was robbed. Evans had declined because he believed divulging their names would put his friends in danger. He explained his friends all lived in the neighborhood where the robbery occurred, while he would soon return to Europe and was not afraid of retaliation. During cross-examination defense counsel asked Evans about his reluctance to identify his friends, "And you're saying that these other people, you do not want to reveal any of their names, right?" Evans replied, "No." Counsel then asked, "And you know that this could verify or maybe rebut what you're saying about who the person was that—what they looked like and robbing you, is that right?" Evans answered, "No. I just don't want to reveal their names because I don't want them to get into something that they're not comfortable getting into." Counsel then moved on to other topics.

Immediately after Evans's testimony Stone's counsel requested the court order Evans to divulge the names of his friends or strike all of Evans's testimony. The motion was denied. The next day Stone filed a written motion to strike Evans's testimony on the ground he had refused to divulge the names of his friends. Stone requested that the court strike Evans's testimony, order him to disclose the names or dismiss the case. During argument on the motion, Stone's counsel additionally requested "at least a statement to the jury in some type of special instruction that, by not giving up [the names], they ought to view his testimony with caution." The motion was denied in its entirety.

b. *Governing law and standard of review*

"If a witness frustrates cross-examination by declining to answer some or all of the questions, the court may strike all or

part of the witness's testimony." (*People v. Price* (1991) 1 Cal.4th 324, 421; accord, *People v. Sanders* (2010) 189 Cal.App.4th 543, 554-555 (*Sanders*).) In determining whether to strike a witness's testimony "based on his or her refusal to answer one or more questions, the trial court should examine "'the *motive* of the witness and the *materiality* of the answer.'"" (*People v. Seminoff* (2008) 159 Cal.App.4th 518, 525-526.) "The court should also consider if less severe remedies are available before employing the 'drastic solution' of striking the witness's entire testimony. [Citation.] These include striking part of the testimony or allowing the trier of fact to consider the witness's failure to answer in evaluating his [or her] credibility." (*Id.* at p. 526; see *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, 736 ["[s]triking a witness's testimony is, of course, a 'drastic solution,' only to be employed 'after less severe means are considered'"].)

The decision whether to strike the witness's testimony or impose another remedy is left to the discretion of the trial court. (*People v. Price, supra,* 1 Cal.4th at p. 421; *People v. Seminoff*, *supra*, 159 Cal.App.4th at p. 528.)

c. *Evans did not frustrate Stone's ability to cross-examine him*

Stone contends the trial court abused its discretion in denying his motion to strike Evans's testimony and his request for a jury instruction regarding Evans's credibility because Evan's refusal to identify his friends prevented Stone from adequately cross-examining Evans and obtaining information that could potentially impeach Evans and exculpate Stone. However, Stone has failed to establish that Evans refused to answer questions on cross-examination or frustrate the cross-examination in any way.

As discussed, defense counsel asked Evans whether he *wanted* to identify his friends. Evans was never directly asked, by the prosecutor or defense counsel, to name the individuals he was with the night of the robbery. While Evans had been asked for the names multiple times before trial, and refused to divulge them, there is no way of knowing how he would have responded to such a question while under oath during trial. Because there was no refusal to answer questions, there was no reason to strike his testimony or specially instruct the jury.

Even if Evans's statement he did not want to divulge the names could be construed as a refusal to answer, the trial court did not err in refusing to strike testimony or give a special jury instruction. Evans's motives in refusing to reveal his friends' identities were to protect their safety and to respect their desire to avoid becoming involved in a trial. Evans did not indicate any intent to impede the justice system or frustrate Stone's defense. In addition, defense counsel was able to conduct a thorough cross-examination of Evans regarding his recollection of the robbery and his identification of Stone as one of the robbers. Evans was cross-examined regarding discrepancies in his description of the robbers and their vehicle, his failure to immediately report the incident, his failure to initially inform the police about the social media video, and his mistaken identification of a necklace recovered by police. (See *Sanders, supra,* 189 Cal.App.4th at p. 556 [no error in refusing to strike testimony of witness who refused to divulge identity of other witnesses where witness "was extensively and exhaustively cross-examined about what he himself did and observed at the time of the incident"].)

Furthermore, Stone's insistence the testimony of the additional eyewitnesses would have been material is speculative.

Even if the witnesses had been identified and located, there is no indication they would have been willing to testify or, even if they were, that they would have remembered the incident sufficiently to provide meaningful testimony. Nor is there any basis for concluding their recollections would have contradicted Evans's testimony. To justify striking a victim's testimony, "there must at least be some indication that these (unknown, unidentified and anonymous) persons would contradict the witness who testified." (*Sanders*, *supra*, 189 Cal.App.4th at p. 557.)

Finally, Stone has not demonstrated the court abused its discretion in refusing to instruct the jury regarding Evans's refusal to identify his friends. The jury was properly instructed regarding the evaluation of witness credibility (CALCRIM No. 226) and eyewitness testimony (CALCRIM No. 315). Further, defense counsel was able to suggest during cross-examination and closing argument that Evans did not want to identify his friends because the robbery had never occurred. On this record, failure to include an additional jury instruction was not an abuse of discretion.

3. *The Trial Court Did Not Abuse Its Discretion by Denying the Motion for a New Trial Based on Alleged Prosecutorial Misconduct*

a. *Relevant proceedings*

During the direct testimony of Holly Burnham, Stone's alibi witness, defense counsel asked her about telephone conversations she had with Stone while he was in custody awaiting trial in this case. Burnham testified that, during one of these telephone calls, Stone had asked her to "bail his cellmate out, some person that he didn't know and I didn't know. So I told him what it all looked like, bailing somebody out of jail who I didn't know." Defense

counsel then asked Burnham if Stone had ever asked her to fabricate an alibi for him in this case. She said he had not.

On cross-examination the prosecutor displayed a call-log showing the time and duration of each telephone call that had taken place between Burnham and Stone while Stone was in custody awaiting trial. The prosecutor played recordings of four of the telephone calls from late August 2016.[4] During these calls Stone repeatedly asked Burnham to "co-sign" for his friend. For example, Stone told Burnham, "[Y]ou just go to the bail-bond and you go up to the bail monitor and co-sign for his and that's it he gonna pay all his . . . soon as he get out he want you to stay right there though, so you can, so you can go get your money with him um, take the money off his card with him and he'll give you the $500." Burnham testified she understood Stone was asking her to post bail for his cellmate, but she refused. While questioning Burnham regarding these calls, the prosecutor asked, without objection from defense counsel, whether the discussion of posting bail for $500 was "a bribe to get you to come into court and testify." Burnham replied it was not.

During closing argument the prosecutor claimed Burnham's alibi was false. In support of this position the prosecutor relied on evidence Burnham did not come forward with the alibi when she was first questioned by police, but waited until being contacted by a defense investigator shortly before trial. The prosecutor also observed Stone and Burnham's demeanor during the telephone calls did not suggest a loving or

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[4] The call-log, recordings and transcripts of the recordings were marked for identification only and were not admitted into evidence. Defense counsel did not object to the display of the call-log or the playback of the recordings.

intimate relationship. As to the discussion of Burnham posting bail for Stone's friend, the prosecutor stated, "I think it's code. I think it's, 'Come to court and testify on my behalf and say I was with you.'" Stone's counsel did not object to this statement.

After the verdict Stone moved for a new trial based in part on alleged prosecutorial misconduct. Stone argued the prosecutor's interpretation of the telephone calls was "ridiculous" and improperly provided his own opinion to the jury. Stone also argued the telephone calls were played only to prejudice him by showing he had been in custody. The trial court denied the motion, explaining it found the telephone calls to be "of little value ultimately" and reasoned that the jury heard the calls and "can make of it what they will." As such, the trial court did not find the prosecution's argument constituted prosecutorial misconduct.

b. *Stone has forfeited his prosecutorial misconduct claim by failing to object at trial*

A criminal defendant may move for a new trial on the ground "the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury." (§ 1181, subd. 5.) """We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard." [Citations.] "'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.'"'" (*People v. Lightsey* (2012) 54 Cal.4th 668, 729; accord, *People v. McCurdy* (2014) 59 Cal.4th 1063, 1108.)

To preserve a prosecutorial misconduct claim for appeal, """a criminal defendant must make a timely and specific objection

and ask the trial court to admonish the jury to disregard the impropriety.'" [Citation.] The lack of a timely objection and request for admonition will be excused only if either would have been futile or if an admonition would not have cured the harm." (*People v. Powell* (2018) 6 Cal.5th 136, 171; accord, *People v. Hill* (1998) 17 Cal.4th 800, 820.) A defendant's filing of a motion for new trial will not revive claims that had not been preserved by a timely and specific objection. (*People v. Cowan* (2010) 50 Cal.4th 401, 486; accord, *People v. Williams* (1997) 16 Cal.4th 153, 254 [rejecting contention that "subsequent arguments in a motion for new trial may substitute for a timely objection"].)

In his reply brief Stone appears to concede his counsel failed to object to the prosecutor's allegedly improper statements during closing argument. However, Stone argues, any objection would have been futile because "[b]y the time [the prosecutor] made this argument in closing, it was too late—the evidence of the call was before the jury . . . ." This argument is without merit. Stone's claim of prosecutorial misconduct stems from the prosecutor's statements during closing argument—not from admission of testimony regarding the telephone calls. Stone has failed to show that any potential prejudice arising from the prosecutor's closing arguments was so egregious that it could not have been cured by an admonition. Accordingly, any claim based on the alleged misconduct has been forfeited, and the trial court was well within its discretion to deny the motion for a new trial on this ground.

4. *Substantial Evidence Supports the Criminal Street Gang Finding*

Stone challenges the jury's finding he committed the robbery for the benefit of a criminal street gang, arguing there

was insufficient evidence the crime had benefitted the gang and the People failed to prove the gang member who committed the predicate offense was a member of the same gang subset as Stone.

To obtain a true finding on an a criminal street gang enhancement allegation, the People must prove the crime at issue was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) A "criminal street gang" is defined as an organization that has as one of its primary activities the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and whose members have engaged in a "pattern of criminal gang activity" by committing two or more of such "predicate offenses" on separate occasions or by two or more persons within a three-year period. (§ 186.22, subds. (e), (f); *People v. Loeun* (1997) 17 Cal.4th 1, 9.) Offenses charged in the case before the jury can be included in the crimes relied upon to show a pattern of criminal gang activity. (*Loeun*, at p. 10; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1401.)

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify

the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60; accord, *People v. Livingston* (2012) 53 Cal.4th 1145, 1170.) "The relevant facts must, however, meet the statutory requirements for a gang enhancement in order for it to apply." (*People v. Garcia* (2014) 224 Cal.App.4th 519, 523.)

Substantial evidence supported the jury's finding the robbery was committed for the benefit of, or in association with, a criminal street gang. Marquez testified both Stone and Gibson had admitted they were Rollin 30's members. Stone and Gibson also had tattoos signifying membership in the gang and had associated with known gang members. Stone's argument the robbery was not for the benefit of the Rollin 30's because it occurred in a rival gang's territory does not undermine this evidence, especially given Marquez's testimony Rollin 30's members rarely committed crimes in their own territory. Marquez's testimony provided substantial evidence from which the jury could reasonably conclude the crime was committed for the benefit of, or in association with, a criminal street gang.

Stone's contention the prosecution failed to establish the requisite predicate offenses is unavailing. The prosecution relied on the current offense as well as a 2014 conviction by a Rollin 30's member to prove a "pattern of criminal gang activity" within the meaning of section 186.22, subdivision (e). Relying on *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), Stone argues the evidence of the 2014 conviction was insufficient to establish a predicate offense because there was no testimony the defendant

in that case belonged to the same Rollin 30's subset to which Stone belonged.

In *Prunty* the Supreme Court considered "what type of showing the prosecution must make when its theory of why a criminal street gang exists turns on the conduct of one or more gang subsets." (*Prunty*, *supra*, 62 Cal.4th at p. 67.) The prosecution in that case presented evidence the defendant identified as a member of the Norteño gang. However, the evidence of predicate offenses offered by the prosecution pertained to activities of two subsets of the Norteño gang. The prosecution's expert did not "offer any specific testimony contending that these subsets' activities connected them to one another or to the Sacramento Norteño gang in general." (*Ibid.*) The Court held this lack of a connection between the subsets and the larger "umbrella" gang precluded application of the criminal street gang enhancement, explaining, "[W]hen the prosecution seeks to prove the street gang enhancement by showing a defendant committed a felony to benefit a given gang, but establishes the commission of the required predicate offenses with evidence of crimes committed by members of the gang's alleged subsets, it must prove a connection between the gang and the subsets." (*Id.* at pp. 67-68; see *id.* at p. 81 ["the prosecution must show that the group the defendant acted to benefit, the group that committed the predicate offenses, and the group whose primary activities are introduced, is one and the same"].)

Contrary to Stone's assertion, *Prunty* does not apply where, as here, the prosecution's theory of why a criminal street gang exists does not rely on prior offenses committed by a gang subset. (See *Prunty*, *supra*, 62 Cal.4th at pp. 67-68 & p. 71, fn. 2; *id.* at p. 91 (conc. opn. of Corrigan, J.) ["The issue we address is a

narrow one. It arises only when the prosecution seeks to prove a street gang enhancement by showing the defendant committed a felony to benefit a broader umbrella gang, but seeks to prove the requisite pattern of criminal gang activity with evidence of felonies committed by members of subsets to the umbrella gang. Our decision is limited to that factual scenario"].) Here, the prosecution introduced evidence both Stone and Gibson identified as Rollin 30's members. While Officer Marquez testified he believed they were members of a particular subset, he said they claimed membership to the Rollin 30's generally and did not specifically claim membership in a subset. In addition, the majority of Marquez's testimony pertained to the activities of the Rollin 30's as a whole. He further stated the 2014 offense was committed by a Rollin 30's member. There was no testimony about any particular subset in relation to the 2014 offense. Because the prosecution's theory did not depend on the conduct of particular subsets, *Prunty* does not apply. (See *People v. Pettie* (2017) 16 Cal.App.5th 23, 49-50 [*Prunty* does not apply where "prosecution's theory was that the defendants were Norteños, not members of a subset gang," and "predicate offenses were all committed by Norteño members for the benefit of that gang, not for the benefit of any subset gang"]; *People v. Ewing* (2016) 244 Cal.App.4th 359, 372-373 [same].)

5. *A Limited Remand Is Appropriate for the Court To Consider Whether To Strike the Section 667, Subdivision (a), Enhancement*

At the time Stone was sentenced, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30,

2018 the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss section 667, subdivision (a), serious felony enhancements. (See Stats. 2018, ch. 1013, §§ 1 & 2.) Because we cannot conclusively determine from the record that remand would be a futile act, we remand for the trial court to consider whether to dismiss or strike one or both of the five-year section 667, subdivision (a), enhancements that it was required to impose at the time of the original sentencing.

## DISPOSITION

The conviction is affirmed, and the matter remanded for the trial court to consider whether to strike the prior serious felony enhancements under section 667, subdivision (a).

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.